No. 341

In the Supreme Court of the United States

OCTOBER TERM, 1957

PETER DI PALERMO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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ject to collateral attack on the ground that it did not allege knowledge of the counterfeit character of the notes.

STATUTE INVOLVED

18 U. S. C. 472 provides:

> Whoever, with intent to defraud, passes, utters, publishes, or sells, or attempts to pass, utter, publish, or sell, or with like intent brings into the United States or keeps in possession or conceals any falsely made, forged, counterfeited, or altered obligation or other security of the United States, shall be fined not more than $5,000 or imprisoned not more than fifteen years, or both.

STATEMENT

In 1949, in the United States District Court for the Southern District of New York, petitioner was convicted on count one of a three-count indictment which charged in count one that petitioner and others "with intent to defraud, did keep in their possession and conceal, certain falsely made, forged and counterfeited obligations and securities of the United States" (R. 3). Petitioner was sentenced to imprisonment for 15 years on count one[1] (R. 7). On appeal, his judgment of conviction was affirmed *sub nom. United States* v. *Farina*, 184 F. 2d 18 (C. A. 2), certiorari denied, 340 U. S. 875; see also 193 F. 2d 436.

Petitioner initiated the present proceedings in January 1957 by a motion under 28 U. S. C. 2255 in which he challenged for the first time (R. 23–24) the sufficiency

[1] He was also sentenced to concurrent terms of imprisonment of ten and five years on counts two and three.

of the indictment on the ground that it failed to allege knowledge on his part of the counterfeit character of the notes (R. 10–20). The District Court denied the motion (R. 29) noting in its opinion that the judge in his charge had told the jury that they must find knowledge (R. 28). The Court of Appeals affirmed *per curiam* (R. 34).

ARGUMENT

Petitioner, having long since been convicted of the crime of keeping counterfeit bills in his possession "with intent to defraud", now seeks release from custody on the ground that the indictment failed to allege that he had knowledge that the bills were counterfeit. His position is wholly without merit.

1. Count one of the indictment alleged that the defendants "with intent to defraud, did keep in their possession and conceal" counterfeit bills. This is a sufficient allegation that petitioner knew the bills were counterfeit. *McKinney* v. *United States*, 172 F. 2d 781, 783 (C. A. 9); *Graffi* v. *United States*, 22 F. 2d 593 (C. A. 7). In *Hill* v. *United States*, 275 Fed. 187 (C. A. 7), relied on by petitioner, the indictment failed to allege either knowledge or intent, alleging simply that the defendant had in his possession a spurious bank note. The court, understandably, found the indictment deficient.

2. The test of the sufficiency of an indictment is whether it apprises the defendant of what he must be prepared to meet and adequately defines the crime to protect the defendant against a subsequent prosecution. *Hagner* v. *United States*, 285 U. S. 427, 431;

Here, as in *United States* v. *Debrow*, 346 U. S. 374, 378—

> It is inconceivable to us how the defendants could possibly be misled as to the offense with which they stood charged.

In the *Debrow* case the Court pointed out that the Federal Rules of Criminal Procedure "were designed to eliminate technicalities in criminal pleading" (346 U. S. at 376). It is clear that the indictment was sufficient even as against attack at the time of the trial.

3. The alleged technical defect in the indictment, furnishes no possible basis for collateral attack. The sufficiency of an indictment is not open in a proceeding under 28 U. S. C. 2255 unless it is so defective that by no reasonable construction can it be said to charge the offense for which conviction was had. *Banks* v. *United States*, 239 F. 2d 409 (C. A. 7); *Keto* v. *United States*, 189 F. 2d 247 (C. A. 8); *Aaron* v. *United States*, 188 F. 2d 446 (C. A. 4), certiorari denied, 341 U. S. 954; *Dickerson* v. *United States*, 175 F. 2d 440 (C. A. 4). *United States* v. *Carll*, 105 U. S. 611, on which petitioner relies, involved an attack upon an indictment on direct review. It was decided long prior to the adoption of the Federal Rules of Criminal Procedure which now govern the sufficiency of an indictment.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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